

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RICHARD A. RODRIGUEZ and DEPARTMENT OF THE AIR FORCE,
SAN ANTONIO LOGISTIC CENTER, KELLY AIR FORCE BASE, San Antonio, TX

*Docket No. 99-92; Submitted on the Record;
Issued May 2, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for a waiver of recovery of \$4,059.99 overpayment in compensation.

On January 29, 1997 appellant, then a 46-year-old material examiner and identifier supervisor, filed a notice of occupational disease and claim for compensation (Form CA-2), alleging that he suffered from a bilateral knee condition as a result of his employment. He alleged that he first became aware of this condition on February 11, 1992.¹ The Office accepted appellant's occupational disease claim for left and right knee strains and for traumatic arthritis in both knees and paid appropriate benefits. On December 10, 1997 he stopped work to undergo a total left knee replacement. Compensation for wage loss commenced on December 10, 1997.

Thereafter, appellant was approved for retirement and in doing so, he accepted a voluntary separation incentive payment of \$25,000.00 that began effective January 31, 1998. In a decision dated March 30, 1998, the Office noted that an overpayment in the amount of \$4,059.99 had occurred because appellant received a voluntary separation incentive pay in the amount of \$25,000.00 while at the same time receiving compensation for total disability. The Office, however, made a preliminary determination that appellant was without fault in creating this overpayment and noted that, if appellant wished a waiver, he should request one.

On July 7, 1998 appellant requested a waiver of the overpayment, submitted an overpayment recovery form and supporting financial document and requested that the Office

¹ On February 11, 1992 appellant filed a notice of traumatic injury and claim for compensation (Form CA-1), alleging that he suffered a twisted left leg and knee when he slipped on water in the men's restroom. On June 24, 1996 he filed a notice of recurrence of disability and claim for continuation of pay/compensation (Form CA2a), alleging that, on May 24, 1996, he awoke in excruciating pain in his left knee. This claim was denied on November 19, 1996, for the reason that the evidence failed to establish that the alleged recurrence was causally related to the injury of February 11, 1992.

review this case based on written evidence. He listed his monthly income as \$814.00 from his Office of Personnel Management annuity check, \$1,120.00 from unemployment compensation, \$501.00 from veteran's benefits and \$391.52 as income from daughter's vehicle. Therefore, appellant's total monthly income was \$2,826.52. He listed his monthly expenses as follows: \$250.00 for food, \$200.00 for clothing, \$525.00 for rent or mortgage, \$230.40 for utilities (gas, fuel, electric, water and telephone), \$426.50 for auto loan payment, \$260.78 for other automobile expenses (gas, oil, maintenance and insurance), \$70.00 for medical expenses, \$100.00 for insurance, \$45.59 for cable, \$47.90 for cellular telephone and \$39.90 for long distance calls. Appellant also lists his debts as Circuit City \$2,206.30, Discover Card \$1,462.74, Mervyns \$247.41, Target \$198.42, Federal Credit Union \$3,829.86, and Visa, \$885.08. The monthly payments on these debts total \$241.31. Therefore, his total monthly expenses were \$2,537.38. Appellant listed his assets as \$415.13 in a credit union account, \$361.39 in a Christmas club account, \$1,256.20 in an IRA and \$2,039.10 in another IRA. Appellant contends that the overpayment was used to pay finances.

By decision dated August 27, 1998, the Office found that appellant was without fault in creating the overpayment. However, the Office denied waiver of the overpayment, finding that he did not establish that he would experience hardship in repaying the overpayment because the evidence did not support that he needed substantially all of his income to meet his necessary living expenses and that the evidence of record did not show that he relinquished a valuable right or changed his position for the worse due to reliance on incorrect payments.

The Board finds that the Office properly denied appellant's request for waiver of recovery of the overpayment after finding that appellant was without fault in creating the overpayment.

When appellant retired, he was not entitled to receive retirement pay together with compensation payments. He was required to make an election between the two benefits.² Appellant, in receiving compensation at the same time he received retirement pay, received compensation to which he was not entitled under the Federal Employees' Compensation Act and accordingly, received an overpayment. The Office found that appellant was not at fault in creating this overpayment.

Appellant inferred in his appeal that because he was without fault he should not have to repay the overpayment. However, the Act and its implementing regulations are clear that entitlement to a waiver is not established solely by finding that appellant is without fault in creating the overpayment.³ Rather, such a finding entitles appellant only to the opportunity to establish a basis for granting a waiver of the recovery of the overpayment pursuant to section 8129 of the Act.⁴ Whether to waive recovery of an overpayment of compensation is a matter

² *John L. Wolf*, 48 ECAB 148, 153 (1996).

³ *James Lloyd Otte*, 48 ECAB 334 (1997).

⁴ 5 U.S.C. § 8129.

that rests within the Office's discretion pursuant to statutory guidelines. Thus, the only issue on appeal is whether the Office's denial of waiver constituted an abuse of discretion.⁵

Section 10.322⁶ of the Act provides that recovery of an overpayment will defeat the purpose of the Act if recovery would cause hardship by depriving a beneficiary of income and resources needed for ordinary and necessary living expenses when the individual from whom recovery is sought needs substantially all his or her current income (including compensation benefits) to meet current ordinary and necessary living expenses and the individual's assets do not exceed the resource base of \$3,000.00 for an individual or \$5,000.00 for an individual with a spouse or one dependent, plus \$600.00 for each additional dependent.⁷ An individual is deemed to need substantially all of his or her current income to meet ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.⁸ In other words, the amount of monthly funds available for debt repayment is the difference between current income and adjusted living expense, *i.e.*, ordinary and necessary living expenses plus \$50.00. In the instant case, appellant listed his monthly income as \$2,826.52. His total monthly expenses equaled \$2,537.38. Since appellant's monthly income exceeded his expenses by \$289.14, he did not need essentially all of his monthly income to meet his expenses. The financial information submitted by appellant therefore showed that he did not meet the financial criteria under which the Office would consider waiver of recovery of the overpayment on the grounds that recovery would defeat the purpose of the Act.

Section 10.323 of the regulations⁹ provides that recovery of an overpayment is considered to be inequitable and against good conscience when an individual, in reliance on such payments or on notice that such payments would be made, relinquished a valuable right or changed his position for the worse. To establish that a valuable right was relinquished, the individual must show that the right was valuable, that it cannot be regained and the action taken was based chiefly or solely on the payments or notice of such payments.¹⁰ To establish a change in position for the worse, the individual must show that he made a decision he otherwise would not have made in reliance on the overpaid amounts and this decision resulted in a loss; conversion of the overpayment into a different form which appellant derived some benefit does not constitute loss for this purpose.¹¹ There is no evidence in this case that appellant relinquished a valuable right or changed his position for the worse in detrimental reliance on the

⁵ *Thomas Lee Jones*, 48 ECAB 666, 668 (1997); *James M. Albers, Jr.*, 36 ECAB 340, 344 (1984) and cases cited therein at note 5.

⁶ 20 C.F.R. § 10.322.

⁷ *Thomas Lee Jones*, *supra* note 5 at 667.

⁸ *Linda D. Lane*, 46 ECAB 727, 732 (1995).

⁹ 20 C.F.R. § 10.323(b).

¹⁰ *John B. Moore*, 44 ECAB 709, 712 (1993).

¹¹ *Stanley K. Hendler*, 44 ECAB 698, 707 (1993).

overpaid compensation.¹² The Office therefore did not abuse its discretion in denying appellant's request for waiver of recovery of the overpayment.

The decisions of the Office of Workers' Compensation Programs dated August 27 and March 30, 1998 are hereby affirmed.

Dated, Washington, D.C.
May 2, 2000

Michael J. Walsh
Chairman

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

¹² See *Leticia C. Taylor*, 47 ECAB 198, 204, (1995).